STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 20, 2014
v	No. 312558 Kent Circuit Court
BRIAN MARKIECE BANKS, Defendant-Appellant.	LC No. 2011-010589-FC

Before: GLEICHER, P.J., and HOEKSTRA and O'CONNELL, JJ.

PER CURIAM.

Defendant appeals by right his convictions for armed robbery, MCL 750.529, felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony, MCL 750.227b. Following a jury trial, the trial court sentenced defendant as a second-offense habitual offender, MCL 769.10, to 9 to 29 years' imprisonment for his armed robbery conviction, 2 to 4 years' imprisonment for his felonious assault conviction, and two years' imprisonment for his felony-firearm conviction. For the reasons stated in this opinion, we affirm.

On appeal, defendant argues that there was insufficient evidence to support all three of his convictions. Specifically, defendant argues that the testimony of the prosecution's witnesses shows only that he was "a victim," of Marquis Parks's "bad behavior," and that the testimony does not show that he intended the commission of any crime or that he had knowledge that Parks intended to commit any crime and gave aid and encouragement to Parks.

We review claims regarding the sufficiency of the evidence de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). When considering a claim of insufficient evidence, we "view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

The elements of armed robbery are established where, in the course of committing a larceny, the defendant (1) "used force or violence against any person who was present or assaulted or put the person in fear," and (2) either "possessed a dangerous weapon, possessed an article used or fashioned in a manner to lead any person present to reasonably believe that the article was a dangerous weapon, or represented orally or otherwise that he or she was in possession of a dangerous weapon." *People v Chambers*, 277 Mich App 1, 7; 742 NW2d 610

(2007). See also MCL 750.529. The elements of felonious assault are: "(1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery." *Chambers*, 277 Mich App at 7. A gun is one of the specified dangerous weapons listed in MCL 750.82. Finally, to obtain a conviction for felony-firearm, the prosecution must establish that the defendant possessed a firearm during the commission of, or attempt to commit, a felony. MCL 750.227b; *People v Johnson*, 293 Mich App 79, 82; 808 NW2d 815 (2011).

In this case, the jury was instructed on the aiding and abetting theory of liability. Under Michigan's aiding and abetting statute, MCL 767.39, an individual "who aids or abets in the commission of an offense may be tried and convicted as if he had directly committed the offense." *People v Moore*, 470 Mich 56, 63; 679 NW2d 41 (2004). To show that an individual aided and abetted the commission of a crime, the prosecution must show that:

> (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement. [*People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).]

Viewing the evidence in a light most favorable to the prosecution, we conclude that the evidence shows the prosecution presented sufficient evidence to support defendant's convictions. In a letter defendant wrote and sent to the prosecutor's office, defendant stated that before arriving at the victim's apartment, Parks mentioned the possibility of a larceny, and asked defendant if he would "have his back" if Parks took something without paying for it. Defendant reiterated the fact that Parks asked whether defendant would "have his back" if he took something from the victim's apartment without paying for it during his trial testimony. Following this exchange, defendant drove Parks to the victim's apartment. The victim testified that Parks and defendant knocked on his door, and that after he let them into his apartment, defendant initiated the violence against the victim, striking him in the face and then hitting him repeatedly, causing injury to his face that required stitches. The victim further testified that while defendant continued to strike him, Parks stole the victim's medical marijuana and two rare dollar bills from the victim's desk. The victim explained that Parks produced a gun during the incident, and pointed it at him. The victim testified that while Parks was pointing the gun, defendant encouraged Parks, in reference to the victim, to "shoot that fool . . . ."

After assaulting the victim and stealing from him, defendant and Parks fled together from the apartment. The victim followed in his own vehicle. Defendant was the driver, and he led the victim on a car chase through residential neighborhoods. During this chase, as described by the victim and several eyewitnesses, defendant stopped or slowed the vehicle, at which point Parks fired the gun at the victim. Defendant then sped away, parking the car a short distance away on a cul-de-sac. Defendant and Parks fled on foot, attempting escape until they were apprehended by police. The stolen dollar bills were later recovered from defendant's car and the marijuana was found in an area through which witnesses indicated defendant and Parks fled.

When viewed in the light most favorable to the prosecution, this evidence plainly constitutes sufficient evidence to support all of defendant's convictions. Regarding the armed

robbery conviction, it is clear that a larceny occurred and that force and violence were used against the victim during the larceny. Moreover, the victim testified that defendant actively hit him during the robbery and that defendant encouraged Parks to shoot the victim with the gun. Defendant then fled the scene with Parks, acting as the driver of the vehicle. Moreover, the felonious assault conviction is supported by sufficient evidence because even defendant admits that he was driving the car and slowed down, at which point Parks shot at the victim through the car window. While defendant notes that he testified that he had no idea Parks had a gun and was not slowing down to enable Parks to shoot defendant, there was other circumstantial evidence on which a rational trier of fact could conclude that defendant knew Parks had a gun and specifically slowed the vehicle to allow Parks to shoot. The jury was free to reject defendant's version of events. Indeed, the credibility of witnesses, the weight to afford the evidence, and the determination as to what inferences may be fairly drawn were all matters for the jury which we will not disturb on appeal. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992); *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). For the same reasons, there was also sufficient evidence to support defendant's felony-firearm conviction.

Defendant raises several additional arguments on appeal in a Standard 4 brief. First, defendant again argues that there was insufficient evidence to support his felony-firearm conviction. Defendant specifically argues that the prosecution was required to prove that he possessed the firearm. However, this argument has no merit because a defendant may be convicted of felony-firearm under an aiding and abetting theory of liability. *Moore*, 470 Mich at 67-70. Because possession of a firearm is necessarily implicit in the use of a firearm, "when a defendant specifically encourages another possessing a gun during the commission of a felony to use that gun, he aids and abets the carrying or possessing of that gun just as surely as if he aided or abetted the principal in obtaining or retaining the gun." *Id.* at 71. Thus, the evidence, as discussed *supra*, was plainly sufficient to support defendant's conviction.

Next, defendant raises numerous ineffective assistance of counsel arguments. Because no evidentiary hearing regarding defendant's claims has been held, our review is limited to mistakes apparent on the record. *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009). A claim alleging the denial of effective assistance of counsel presents a mixed question of law and fact. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Questions of law are reviewed de novo, and a trial court's findings of fact, if any, are reviewed for clear error. *Id.*

To establish the ineffective assistance of counsel, a defendant bears the burden of demonstrating: (1) that "counsel's representation fell below an objective standard of reasonableness," and (2) that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *People v Meissner*, 294 Mich App 438, 459; 812 NW2d 37 (2011), citing *Strickland v Washington*, 466 US 668, 688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984). The effective assistance of counsel is presumed, and "[t]his Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). Defendant bears a heavy burden of proving the challenged action was not sound trial strategy. *LeBlanc*, 465 Mich at 578.

Defendant first contends counsel rendered ineffective assistance when he failed to inform defendant of the correct recommended minimum sentencing range under the legislative guidelines before defendant rejected the prosecution's plea bargain.

The right to the effective assistance of counsel extends to the plea-bargaining process. *Lafler v Cooper*, __ US __; 132 S Ct 1376, 1384; 182 L Ed 2d 398 (2012). In the context of plea bargaining, counsel's role is to consult with defendant, explaining the matter to defendant to enable him to make an informed decision between accepting the plea and proceeding to trial. *People v Corteway*, 212 Mich App 442, 446; 538 NW2d 60 (1995). To prevail on a claim that counsel's ineffective performance caused defendant to reject a plea agreement, defendant must show that the plea agreement was more favorable than the judgment ultimately imposed and that, but for the ineffective advice of counsel, there was a reasonable probability that defendant would have accepted the plea, that the prosecution would not have withdrawn the offer, and that the court would have accepted the terms of the plea. *Lafler*, __ US __; 132 S Ct at 1385.

In this case, defendant has not met this burden. The record does not support his contention that counsel was ignorant of the consequences of proceeding to trial or that he failed to inform defendant of those consequences. On the contrary, on the first day of trial, defense counsel placed on the record the "final" plea offer, stating that if defendant proceeded to trial, the sentence if convicted could be "extremely, extremely higher" than the plea offer. Defense counsel in fact overestimated defendant's potential sentencing range, placing it as high as 81 to 168 months' imprisonment when defendant's actual range after conviction ended up being 81 to 135 months' imprisonment. Faced with this overestimation, defendant still opted to reject the plea offer and proceed to trial. Consequently, given counsel's remarks on the first day of trial, despite the fact that, at an earlier plea proceeding, the prosecution stated the range would likely be 51 to 106 months' imprisonment, there is no basis to conclude that counsel's representation fell below an objectively reasonable level. Further, given defendant's decision on the first day of trial when counsel stated the range as high as 81 to 168 months, there is no reason to suppose that defendant would have accepted the plea agreement at the earlier proceeding if differently advised.

Indeed, even on appeal, where defendant bears the burden of establishing the factual predicate of his claim, defendant has only stated that he "might" have accepted the offer if he knew the correct range at the plea proceedings. This unsworn suggestion that he "might" have made a different decision falls short of establishing the factual predicate of his claim. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). In short, on the record presented, defendant has not established he would have accepted the plea offer if differently advised and he has thus failed to establish the ineffective assistance of counsel. See *Lafler*, __ US __; 132 S Ct at 1385.

Defendant next alleges counsel provided ineffective assistance by asking a police officer about his expertise regarding the caliber of shell casings found at the scene of the shooting and whether those casings corresponded to an automatic weapon, a topic defendant contends the witness was not qualified to discuss.

Contrary to defendant's argument, we see nothing objectively unreasonable in defense counsel asking the police officer, as a lay witness, to offer opinion and inferences which are " (a)

rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." MRE 701. Indeed, MRE 701, has been liberally applied, *People v Oliver*, 170 Mich App 38, 50; 427 NW2d 898 (1988), mod on other grounds 433 Mich 862 (1989), and has been construed as allowing lay witnesses to testify about their perceptions in relation to their past experiences, provided "[t]he testimony was of a general nature, without any reference to technical comparison or scientific analysis." See *People v Dobek*, 274 Mich App 58, 78; 732 NW2d 546 (2007), quoting *Co-Jo, Inc v Strand*, 226 Mich App 108, 117; 572 NW2d 251 (1997). Here, the officer read writing on the bullet, testifying that the bullets said ".380 ACP," which he testified comported with a semi-automatic weapon. Having based this conclusion on his perception of the shell casings and his past experience with weaponry, this general, not overly technical opinion, which was helpful to the jury's determination of fact, was not improperly elicited. MRE 702; *Oliver*, 170 Mich App at 50.

Furthermore, that defense counsel would choose to elicit such testimony constituted sound trial strategy. *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). In particular, on direct examination, the officer described the writing on the shell casings, indicating that the .380 referred to a caliber of weapon and that such a caliber was semi-automatic. Defense counsel sought to dispute this statement by exploring whether .380 caliber bullets could ever be used with a revolver, a conclusion which would be inconsistent with the victim's claim to have seen a semi-automatic weapon. Given that the questions evidenced a sound trial strategy and that, if anything, the officer's equivocal answers to those questions benefited defendant's position, defendant has also failed to show that, but for counsel's performance, there was a reasonable probability of a different outcome, and he has not overcome the presumption that counsel provided effective assistance. *Meissner*, 294 Mich App at 459.

Defendant also contends counsel provided ineffective assistance by failing to cross examine the local resident who discovered the shell casings on the street where the shooting occurred. Again, decisions regarding whether to question witnesses are presumed to be matters of trial strategy. *Horn*, 279 Mich App at 39. Further, although defendant alleges on appeal that the shell casing were somehow "tainted," an issue he claims should have been explored on cross examination, this accusation has no basis in the lower court record. Similarly, defendant asserts without basis in the record available that counsel failed to investigate before trial, interview witnesses, or apprise himself of the testimony that would be offered at trial. Having failed to establish the factual predicate of his claim, defendant has not met his burden of establishing the ineffective assistance of counsel. *Hoag*, 460 Mich at 6. Apart from defendant's failure to develop a supporting record, a claim of ineffective assistance of counsel may only be premised on a failure to cross examine witnesses where defendant shows this failure deprived him of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004); *People v Hopson*, 178 Mich App 406, 412; 444 NW2d 167 (1989). Defendant does not explain, however, what substantial defense could have been presented that was not offered at trial. On the contrary, because defendant's only proffered defense was actually raised at trial, defendant was not denied a substantial defense and defendant's ineffective assistance of counsel claim is without merit. *Dixon*, 263 Mich App at 398.

In a related argument, defendant questions how the shell casings could have been admitted when they were not found by police and he alleges counsel was ineffective for not objecting to the evidence. Defendant has not identified any basis for objecting to the shell

casings and, contrary to defendant's argument, because those shell casings were relevant evidence, they were admissible. MRE 401; MRE 402. Any objection would thus have been futile and counsel is not ineffective for failing to make futile objections. See *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003).

Next, defendant asserts counsel provided ineffective assistance by failing to object during closing arguments when the prosecution stated: "Even if you believe [defendant], that there was no gun presented in the apartment, it's still an armed robbery."

The decision to refrain from objecting during closing arguments is a matter of trial strategy, often undertaken to avoid drawing attention to the prosecution's remarks. *People v Unger*, 278 Mich App 210, 242; 749 NW2d 272 (2008). Further, any objection to the prosecution's remarks in this case would have been futile because the prosecution is free to argue the evidence and all reasonable inferences arising therefrom. *Id.* at 236. Here, because the law treats armed robbery as a transactional offense, encompassing "flight or attempted flight after the commission of a larceny," MCL 750.530(2); *Chambers*, 277 Mich App at 7, the prosecution reasonably argued that Parks's use of the gun during the car chase, i.e., during flight after the commission of a larceny, elevated the crime to armed robbery. Given there was nothing improper in the prosecution's remarks, defense counsel's objection would have been futile and counsel will not be ineffective for failing to offer a futile objection. *Ackerman*, 257 Mich App at 450. Moreover, the trial court instructed the jury that the "lawyer's statements and arguments are not evidence," thereby curing any prejudice. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

Defendant also argues counsel failed to challenge the sufficiency of the evidence at trial, an undeveloped claim which defendant has abandoned by his failure to cite any legal authority. *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001). In any event, what arguments to raise, questions to ask, and evidence to present constituted issues of trial strategy, and, defendant has not overcome the presumption that counsel provided effective assistance. *Meissner*, 294 Mich App at 459; *Horn*, 279 Mich App at 39.

Regarding his felony-firearm conviction, defendant also contends the trial court improperly instructed the jury. Defendant waived any challenge to the jury instructions when his trial counsel expressly approved the instructions on the record. *People v Kowalski*, 489 Mich 488, 504; 803 NW2d 200 (2011). Nevertheless, considering the merits of this issue, we conclude that no plain error has occurred because, taken as a whole, the trial court's instructions clearly presented the applicable law and issues to be tried. See *id.* at 505; *People v McGhee*, 268 Mich App 600, 606; 709 NW2d 595 (2005). Specifically, contrary to defendant's arguments on appeal, the jury did not need to find that he personally possessed the firearm because, as discussed, a conviction for felony-firearm can be maintained on an aiding and abetting theory, *Moore*, 470 Mich at 67-70. Thus there was no error in instructing the jury that a conviction could be maintained if "someone [defendant] aided or abetted knowingly carried or possessed a firearm." Similarly, contrary to defendant's argument, although the felony-firearm statute requires possession of a firearm during the commission or attempt to commit a felony, it does not require *conviction* for that underlying offense. *People v Lewis*, 415 Mich 443, 455; 330 NW2d 16 (1982). In other words, conviction of an underlying felony is not required, and the trial court did not err in so instructing the jury. *Id.* Having concluded the trial court's instructions on

felony-firearm were proper, we also hold counsel was not ineffective for failing to object. Any such objection would have been futile, and counsel will not be found ineffective for failing to make a futile objection. *Ackerman*, 257 Mich App at 455.

Defendant also maintains that the prosecution's introduction of a report relating to the victim's 911 call during the car chase violated the Confrontation Clause and counsel was ineffective for failing to object to the report's admission.

The Confrontation Clause guarantees a defendant the right to confront the witnesses against him. US Const, Am VI; Const 1963, art 1, § 20. For this reason, out-of-court testimonial statements by a witness who does not appear at trial may not be used against a defendant unless he has had a prior opportunity to cross examine the witness. *People v Dendel*, 289 Mich App 445, 453; 797 NW2d 645 (2010), citing *Crawford v Washington*, 541 US 36, 53-54; 124 S Ct 1354; 158 L Ed 2d 177 (2004). "A pretrial statement is testimonial if the declarant should reasonably have expected the statement to be used in a prosecutorial manner and if the statement was made under circumstances that would cause an objective witness reasonably to believe that the statement would be available for use at a later trial." *Dendel*, 289 Mich App at 453.

Applying these principles in the present case, it is apparent the introduction of the 911 report did not run afoul of the Confrontation Clause. In particular, insofar as the report can be seen as a record of statements made by the victim, such statements were not testimonial because they were made in the context of an ongoing emergency, not in response to a criminal investigation after the incident had occurred. See *Davis v Washington*, 547 US 813, 827-828; 126 S Ct 2266; 165 L Ed 2d 224 (2006). Further, because the victim testified at trial, defendant had the opportunity to cross examine him and there is no basis for the assertion that he was denied his right to confront the victim about the statements contained in the 911 report.

To the extent defendant argues that the report involves statements by the preparer of the report, such statements were also not testimonial in nature. Again, on the record available, nothing supports that the report was prepared in response to a police investigation after the fact. *Id.* at 822. Further, nothing in the report implicated defendant in the offenses; nor was there any type of analysis contained in the report that could be used to incriminate defendant. Cf. *People v Jambor (On Remand)*, 273 Mich App 477, 484; 729 NW2d 569 (2007) (noting that the public records exception to the hearsay rule "has been construed to allow admission of routine police reports made in a nonadversarial setting"). Under these circumstances, a reasonable person would not anticipate that the statements would later be used at trial and, because the report was thus nontestimonial, its introduction did not violate the Confrontation Clause. *Dendel*, 289 Mich App at 453. Recognizing that the introduction of the 911 report did not violate the Confrontation Clause, it follows that counsel was not ineffective for failing to object to the report on these grounds because such objection would have been futile. *Ackerman*, 257 Mich App at 455.

Defendant next alleges that his jury array was not drawn from a fair cross section of the community as required by the Sixth Amendment. Defendant failed to object in the trial court, thus, his claim is unpreserved and reviewed for plain error. *People v Eccles*, 260 Mich App 379, 385; 677 NW2d 76 (2004). Although defendant maintains that African-American individuals were underrepresented in the jury venire and on his petit jury, he cites no legal authority in support of his position and he has, therefore, abandoned his claim. *People v Hanna*, 223 Mich

App 466, 475; 567 NW2d 12 (1997). Even if defendant had not abandoned his argument, he has failed to show plain error affecting his substantial rights. He alleges that "one maybe two" individuals in the jury venire were African-American. However, because defendant failed to object in the lower court, there is no evidence to support his assertions regarding the number of African-Americans on the venire. *People v McKinney*, 258 Mich App 157, 161; 670 NW2d 254 (2003) Moreover, defendant has not provided any information regarding the racial composition of the community, meaning there is no basis on which to determine whether the composition of the jury venire was "fair and reasonable in relation to the number of such persons in the community." *People v Bryant*, 491 Mich 575, 597; 822 NW2d 124 (2012). Lastly, defendant has not even alleged, let alone established, "systematic exclusion" of African-Americans. *Id.* Ultimately, there is no evidence in the record to support his allegations on appeal and, consequently, he has not shown plain error occurred in the composition of the jury venire. *McKinney*, 258 Mich App at 161.

Regarding defendant's petit jury, again, the lower court record does not support his allegations. Further, defendant was not entitled to a petit jury that exactly mirrors the community, meaning there is simply no legal basis for his claim. *People v Howard*, 226 Mich App 528, 533; 575 NW2d 16 (1997). Because there is no indication that the jury venire violated the fair cross section requirement and defendant was not entitled to a petit jury mirroring the community, defendant has also not established that counsel provided ineffective assistance in relation to the jury selection process.

Lastly, in his brief on appeal, defendant requests a *Ginther*[1] hearing. Defendant submits this request without making an actual motion or explaining in any detail why such a hearing would be necessary. Further, defendant has not supported his request with affidavits or other proof to establish the facts he believes will be developed on remand as required by MCR 7.211(C)(1). We decline to remand for an evidentiary hearing.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Joel P. Hoekstra
/s/ Peter D. O'Connell

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).